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No. 89-453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
et al., Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN JEWISH COMMITTEE, BLACK CITIZENS FOR A FAIR MEDIA, COMMUNICATIONS COMMITTEE OF THE CONNECTICUT CONFERENCE OF THE UNITED CHURCH OF CHRIST, DEPARTMENT OF COMMUNICATIONS OF THE CAPITOL REGION CONFERENCE OF CHURCHES, FIDELIA LANE, OFFICE OF COMMUNICATIONS OF THE UNITED CHURCH OF CHRIST, PEOPLE FOR THE AMERICAN WAY, THE REVEREND ALEXIS SIDORAK, STEPHEN SIDORAK, SHERMAN G. TARR, TELECOMMUNICATIONS RESEARCH AND ACTION CENTER, AND THE REVEREND MARK WELCH

As **Amici Curiae** In Support of Respondent[1]

[1] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. The letters of consent have been filed separately with the Clerk of the Court.

INTEREST OF AMICI CURIAE

Amici represent viewers and listeners of radio and television from a variety of racial, ethnic and religious backgrounds. As consumers of broadcast programming, *amici* are vitally interested in the Federal Communications Commission's ("FCC" or "Commission") minority enhancement policy because it increases the diversity of viewpoints presented on television and radio.

The American Jewish Committee, founded in 1906 to protect the civil and religious rights of Jews, is an organization of 40,000 Jews who are committed to "liberty and justice for all." Black Citizens for a Fair Media, established in 1971, is a citizens' group which includes representatives from over 250 community organizations. The Office of Communication ("OC/UCC") is an instrumentality of the United Church of Christ, a Protestant denomination of 1.65 million members nationwide. OC/UCC has consistently supported diversity of viewpoint in the marketplace of ideas in the course of its twenty-five year history as a public interest advocate. People for the American Way is a 285,000 member, non-partisan citizens' organization established in 1980 by a group of religious, civic, and educational leaders to promote and protect civil and constitutional rights, including first amendment freedoms, and to promote tolerance of our nation's pluralism and diversity. Telecommunications Research and Action Center is a Washington D.C. based, not for profit, public interest group committed to encouraging diversity in the broadcast industry.

The Communications Committee of the Connecticut Conference of the United Church of Christ; the Department of Communications of the Capitol Region Conference of Churches; Fidelia Lane; The Reverend Alexis Sidorak; Stephen Sidorak; Sherman G. Tarr; and The Reverend Mark Welch are representatives of significant segments of the viewing public in the Hartford, Connecticut area. These individuals and organizations have been, or are, successors in interest to

participants in the litigation pertaining to the license for Channel 18 in Hartford, Connecticut.[2]

SUMMARY OF ARGUMENT

The FCC policy of considering minority ownership and management as one "plus factor" in multi-factor broadcast license proceedings is designed to serve the recognized governmental interest of promoting broadcast viewpoint diversity. This Court has explicitly recognized the importance of achieving the widest possible dissemination of information from diverse and antagonistic sources, *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978), and promoting the presentation by broadcasters of "those views and voices which are representative of their community." *FCC v. League of Women Voters of California*, 468 U.S. 364, 377 (1984). The FCC's interest in promoting diversity is compelling, particularly in light of the significant influence of the broadcast media, the nature of the FCC licensing process, and the underrepresentation of minorities in broadcasting. The objective of promoting racial diversity in broadcasting is similar to the interest in promoting racial diversity in education recognized by members of this Court in previous cases, and will further the interests of *all* viewers and listeners, such as *amici* and their members.

The FCC policy is also narrowly tailored to achieve its objective of promoting racial diversity. As FCC experience has demonstrated, non-racial means have failed to serve these interests. Moreover, the FCC has implemented its policy on a flexible, individualized basis so that enhancements are provided only where they will serve the governmental interest. Contrary

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[2] That litigation is now before this Court. *Astroline Communications Co. Ltd. v. Shurberg Broadcasting of Hartford, Inc.*, 876 F.2d 902 (D.C. Cir. 1989), *cert. granted*, No. 89-700 (Jan. 8, 1990). As parties to that proceeding before the agency, and as *amici curiae* in the Court of Appeals in that matter, they, along with the other *amici*, have supported not only the FCC's distress sale policy, but also its policy promoting minority and female ownership in comparative hearings.

to Petitioner's claim that minority status is generally dispositive, claims based on minority status can be, and routinely are, rebutted on a case-by-case basis. No licenses are set aside for any group, no one is excluded from applying for any license based upon race, and minority ownership and management is but one factor in a complex, multi-factor proceeding. The policy is limited in duration and has only a diffuse impact on non-minorities.

Although the FCC minority enhancement policy would thus pass constitutional muster under even the most exacting scrutiny applied by this Court, *amici* disagree with Petitioner's assertion that strict scrutiny is applicable in this case. The FCC policy clearly implicates Congress' power under section five of the fourteenth amendment, and it would be improper for this or any other court to subject this policy to the same strict scrutiny which is applied to state and local measures. Accordingly, it is all the more clear that the FCC policy should be sustained by this Court.[3]

I. FCC MINORITY ENHANCEMENT POLICIES SERVE THE COMPELLING GOVERNMENT INTEREST IN PROMOTING DIVERSITY

Through the use of the minority enhancement policy in comparative licensing hearings, the FCC aims to achieve a marketplace of ideas and viewpoints that reflects the diversity of backgrounds and experiences of the nation's population. This policy is important for all viewers and listeners. As the FCC has

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[3] This brief addresses only the constitutionality of the minority enhancement policy and does not analyze the separate question of the constitutionality of the enhancement awarded to female owners who propose to be integrated in station management. While *amici* support the female enhancement policy, the Court need not reach this issue in light of the fact that female ownership played virtually no role in the FCC decision under review. *See Winter Park Communications*, 3 FCC Rcd 866, 867 (1988). Should the court reach this issue, however, we urge that it find the policy constitutional. If, as *amici*, argue, the minority enhancement policy can withstand strict scrutiny, the female enhancement policy should be able to withstand the lesser review applied to distinctions based on gender. *See Craig v. Boren*, 429 U.S. 190 (1976).

concluded, the continuing lack of minority participation "is detrimental not only to the minority audience but to all the viewing and listening public." *See Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 981 (1978) (hereinafter *1978 Policy Statement*).[4]

This commitment to diverse ownership and programming is essential to the preservation of first amendment freedoms. The central purpose of the first amendment is to provide "an uninhibited marketplace of ideas in which the truth will ultimately prevail." *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 390 (1969). This marketplace is vital because maintaining an informed electorate is basic to the functioning of a democracy. *Id.* The best way to guarantee this right is to insure that information suppliers (owners and operators of broadcast facilities) represent diverse elements in society.

The FCC has concluded that encouraging minority ownership and management is an essential component of this broad effort to assure diversity.[5] Since, as of 1981, less than two percent of

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[4] *See also Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989). Judge Williams' opinion evidences a misunderstanding of the primary purpose of the minority enhancement policy when he describes the policy as having "the purpose of generating programs 'targeted' at specific ethnic groups." *Id.* at 357. *See also* Brief of United States as *amicus curiae* at 25 (asserting same misunderstanding).

[5] Both the Petitioner and the United States as *amicus curiae* claim that licensees who benefit from the minority enhancement will suffer from stigmatic harm. This view arises from a belief that minorities are inferior as applicants and can only prevail in a comparative hearing with the assistance of the minority enhancement. *See* Brief of Petitioner at 38; Brief of United States as *amicus curiae* at 8. However, this concern over a stigmatic harm evidences a misunderstanding of the comparative hearing process and of the minority enhancement. There is a threshold requirement in the comparative process that all prospective licensees be qualified to operate broadcast stations. *See Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965); *1978 Policy Statement*, 68 F.C.C.2d 979 (1978). After the FCC finds an applicant to be qualified, the FCC compares all qualified applicants to determine which applicant would *best* serve the public interest. Pursuant to the individualized case-by-case process described

continued

commercial broadcast stations were minority owned, H.R. Conf. Rep. No. 97-765, 97th Cong., 2d Sess. 43 (1982) (*reprinted in* 1982 U.S. Code Cong. Ad. News 2287), this conclusion is eminently reasonable. Thus, the minority preference policy, although influencing the award of relatively few licenses, nonetheless forms a vital part of the FCC's licensing scheme.

A. The Media's Influence on the Public and the Nature of the FCC's Licensing Process Makes Achieving Viewpoint Diversity a Compelling Governmental Interest

The power and influence of the broadcast media over the lives of Americans simply cannot be overstated. Aside from work and sleep, television viewing is the primary activity of most Americans. G. Comstock, S. Chaffee, N. Katzman, M. McCombs, D. Roberts, *Television and Human Behavior* 10 (1978). The average American spends over seven hours daily listening to radio and/or watching television. *Broadcasting/Cablecasting Yearbook* A-2 (1988). Access to broadcast media is almost universal in this country,[6] and many Americans rely more heavily on broadcasting than on newspapers as their primary news source.[7]

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in Section II(B) below, the FCC may consider an applicant's minority status to be a factor which enhances its qualifications to operate a station because it is likely to present viewpoints that are currently underrepresented in the broadcast media. Thus, in the rare circumstance in which two applicants are equal in all respects except for the fact that one has minority owner/managers and the other does not, the FCC recognizes the minority applicant as being better qualified. No stigmatic harm should attach under a system in which a minority may prevail as a result of being the better qualified applicant.

[6] In 1989 more Americans than ever before had access to radio and television. More than 98% of American households had a television set and more than 99% of American households had a radio. *Broadcasting/Cablecasting Yearbook* G-16 (1989).

[7] The latest study by the Roper Organization shows that 66% of the United States public turns to television as the source of most of its news and that 55% rank it as the most reliable news source. *Broadcasting/Cablecasting Yearbook* A-2 (1988).

Because television and radio cannot tell or show their audience everything that is happening in the world, the editors, who determine what information to broadcast, play a subtle but influential role in their audience's lives. Broadcasters have the power to shape what people see by the use of editorial judgments.

This influence of broadcasting over public opinion underscores the importance of this country's broadcast licensing scheme, which mandates that licensees serve the "public interest." 47 U.S.C. § 309(a) (1982). As this Court specifically recognized in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), ""[t]he public interest" standard necessarily invites reference to first amendment principles,' and in particular to the first amendment goal of achieving 'the widest possible dissemination of information from diverse and antagonistic sources.'" *Id.* at 795 (*quoting CBS v. Democratic National Committee*, 412 U.S. 94, 122 (1973); *Associated Press v. United States*, 326 U.S. 1, 20 (1945)). It is precisely the objective of exposing the public to a wide variety of diverse viewpoints which the FCC's minority preference policy seeks to achieve by promoting diversity in ownership and operation of broadcast facilities. Given the power of the media to influence the public's perception of the world and the lack of minority participation, that interest is all the more compelling. Indeed, the Communications Act conferred broad authority upon the FCC to carry out the "obligation ... to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976) (*citing Office of Communication of United Church of Christ v. FCC*, 359 F.2d 944 (D.C.Cir. 1966)).[8]

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[8] The Acting Solicitor General incorrectly cites *NAACP v. FPC*, 425 U.S. 662, in his challenge to the proposition "that a federal administrative agency, acting under a general grant of authority to regulate a particular industry in the public interest, should be entitled to any special deference . . . ." *Brief* for the United States as *amicus curiae* at 14. In fact, in *NAACP v. FPC*, this Court indicated that, while the Federal Power Commission had no such authority, the Communications Act did, indeed, confer such power upon the FCC in fulfillment of its responsibilities to insure diverse programming.

The conclusion that promoting diversity in broadcast ownership and operation is a compelling interest is reinforced by the nature of the FCC licensing process. In comparative broadcast hearings, the FCC is faced with the dual tasks of providing "the best practicable service to the public and . . . a maximum diffusion of control of the media of mass communications." *1965 Policy Statement*, 1 F.C.C.2d at 394.

Those who do receive broadcast licenses are granted a temporary privilege, rather than ownership of the frequencies. 47 U.S.C. § 301 (1982). However, as a practical matter, licensees are routinely granted renewals of their licenses as long as they serve the public interest. Because the number of applicants exceeds the number of available licenses, this Court has stated that "those who are granted a license to broadcast must serve in a sense as fiduciaries for the public by presenting 'those views and voices which are representative of their communities.'" *League of Women Voters of California*, 468 U.S. at 377 (*quoting Red Lion*, 395 U.S. at 389). At the same time, however, broadcasters also have considerable latitude in the use of their licenses. *See CBS v. FCC*, 453 U.S. 367, 395 (1981) (*quoting CBS v. DNC*, 412 U.S. at 110). The FCC has recognized that license "'ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of [broadcast] presentation.'" *FCC v. NCCB*, 436 U.S. at 785 (*quoting Rules Relating to Multiple Ownership of Standard, FM, and Television Stations, Second Report and Order*, 50 F.C.C.2d 1046, 1050 (1975)).

Thus, although broadcasters enjoy wide editorial freedom under the first amendment, the public also has a first amendment right to receive the widest possible dissemination of information. When these two interests clash, a sensitive accommodation is required.

Precisely because of the editorial freedom of licensees and because of the profound influence they exert over public opinion, the FCC has a compelling interest in assuring that broadcast ownership is widely dispersed. Only through regulation of ownership can the FCC assure the kind of diversity vital to the democratic process without interfering with broadcasters' equally vital constitutional right of editorial freedom. The FCC's minority enhancement policy is best understood as a careful effort to

maintain this delicate balance. Here, as in other contexts, "Congress and [the FCC] have established a delicately balanced system of regulation intended to serve the interests of all concerned," and "[the Court] must afford great weight to the decisions of Congress and the experience of the Commission." *CBS v. DNC*, 412 U.S. at 102.

B. The Minority Enhancement Policy Is Supported by the Diversity Rationale of Justice Powell's Opinion in *Bakke* and Is Different from the Racial Preference Scheme Invalidated in Croson

The minority enhancement policy is very similar to the university admissions plan approved by a majority of this Court in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and discussed in Justice Powell's opinion announcing the Court's judgment. Justice Powell reasoned that a state university's goal of providing a diverse student body was supported by the first amendment because diversity promotes the widest dissemination of ideas and viewpoints. Therefore, race can be used as a factor in admissions because minorities would not otherwise bring "to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States." *Bakke*, 438 U.S. at 323.

The goal of achieving broadcast diversity is closely analogous to that of achieving educational diversity. Justice Powell viewed academic freedom as a first amendment concern that entitles a university to promote the goal of attaining a diverse student body that fosters an "atmosphere which is conducive to speculation, experimentation and creation — so essential to the quality of higher education." *Bakke*, 438 U.S. at 312. Similarly, the FCC bases the minority enhancement policy on the premise that the public has a first amendment right to receive information from diverse and antagonistic sources. The government's interest in guaranteeing access to a wide variety of broadcast viewpoints and opinions is at least as compelling as its interest in creating a diverse student body at a public university.

The minority enhancement policy is clearly distinguishable from racial preference programs invalidated by this Court. In *City*

of Richmond v. J.A. Croson, 488 U.S.___, 109 S.Ct. 706 (1989), this Court declared unconstitutional a set-aside plan that required at least thirty percent of each city construction contract to be awarded to "Minority Business Enterprises." This plan was fundamentally different from the FCC's minority enhancement policy. No one could plausibly argue that bridges and roads built by minority contractors are different from, or better than, those built by the winner of a competitive bidding procedure. In contrast, the entire viewing and listening public is the primary beneficiary of the FCC's minority enhancement. The broadcasting choices of minority broadcast managers *are* different from those of their majority counterparts and afford the public benefits by exposure to these diverse views. *See Report of the National Advisory Commission on Civil Disorders* 203 (1968) (*Kerner Commission Report*).[9]

II. THE FCC'S POLICY IS NARROWLY TAILORED TO ACHIEVE PROGRAM DIVERSITY

Under strict scrutiny analysis, race-conscious measures must be narrowly tailored to achieve their goals. *See Croson*, 109 S.Ct. 706; *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). Such measures need not, however, be limited to the least restrictive means of implementation. *Fullilove*, 448 U.S. at 506 n.8 (Powell, J., concurring). Moreover, "[i]n no matter should . . . [this Court] pay more deference to the opinion of Congress than

[9] By the same token, the interest promoted by the FCC policy is substantially different from the rationale for the lay-off policy invalidated by this Court in *Wygant v. Jackson Board of Education*, 467 U.S. 267 (1986). Unlike the Jackson Board's lay-off scheme, the FCC policy is not intended to remedy general societal discrimination or to provide "role models" for minorities. *Cf. Wygant*, 476 U.S. at 275-276 (opinion of Powell, J.); *id.* at 286-288 (Opinion of O'Connor, J.). Instead, it is intended to serve the very different goal of promoting racial diversity in broadcasting for the sake of *all* viewers and listeners. *Id.* at 288 n. *. As Justice O'Connor explicitly recognized in the context of education, a government interest in "the promotion of racial diversity has been found sufficiently 'compelling' . . . . to support the use of racial considerations in furthering that interest." *Id.* at 286.

in the choice of instrumentalities to perform a function that is within its power." *Fullilove*, 448 U.S. at 480 (*quoting National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 603 (1949)). With their special responsibility and competence in broadcast regulation, Congress and the FCC, are in the best position to judge whether an alternative remedy would have been effective in promoting diversity of viewpoints, and to assess whether or not a particular race-conscious program is appropriate. *Cf. Local 28 Sheet Metal Workers v. EEOC*, 478 U.S. 421, 486 (1986) (Powell, J., concurring).

In determining the constitutionality of the means selected, this Court has examined a variety of factors. These include the efficacy of alternative measures, the existence (where relevant) of waiver provisions, the duration of the measure, and the impact of the measure on third parties.[10] *See Paradise*, 480 U.S. at 171; *Fullilove*, 448 U.S. at 511-16 (Powell, J., concurring); *see also Wygant*, 476 U.S. at 280-281; *id.* at 293-294 (O'Connor, J., concurring). The FCC policy in this case clearly satisfies all these criteria.

[10] This Court has identified an additional criterion, the relationship of any numerical requirements to the available minority members in the appropriate market. *See United States v. Paradise*, 480 U.S. 149, 171 (1987). This criterion does not apply in this context because the FCC's minority enhancement policy, unlike the set-asides involved in *Croson*, *Fullilove*, and *Bakke*, reserves no quotas or fixed percentages of licenses for minorities. The FCC's award of minority enhancement credits "is not a grant of any given number of permits to minorities or a denial to qualified nonminorities of the ability freely to compete for permits; it is instead a consideration of minority status as but *one factor* in a competitive multi-factor selection system that is designed to obtain a diverse mix of broadcasters." *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 613 (D.C. Cir. 1984) (emphasis in the original). In this respect, the FCC policy is similar to the practice approved under Title VII in *Johnson v. Transportation Agency, Santa Clara County, CA.*, 480 U.S. 616 (1987), in which race was merely one "plus factor" in a multi-factor promotion selection system.

A. Alternative Measures Have Failed To Increase the Number of Minority Voices

In upholding the preference plan in *Fullilove*, three members of this Court noted that, before adopting the set-asides, Congress had considered and attempted alternatives that were not based on racial criteria. *See Fullilove*, 448 U.S. at 463-67; *id.* at 511 (Powell, J., concurring). In addition, a majority of this Court in *Croson* stated that before a racial preference can be employed, there must have been "consideration of the use of race-neutral means to increase minority business participation." *Croson*, 109 S.Ct. at 728; *see also Paradise*, 480 U.S. at 171. Here, there has been more than mere "consideration" of race-neutral alternatives by the FCC.[11] *See generally* Brief of FCC in *Astroline*, No. 89-700, at 38-42.

The FCC has a long history of applying race-neutral alternatives designed specifically to achieve diversity of viewpoints. As an example, for many years the Commission's "ascertainment rules" required licensees to contact community leaders and members of the general public to obtain information about community interests and to present programming responsive to those interests. *See, e.g., Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C.2d

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[11] It is important to keep in mind that the FCC cannot be required to exhaust every imaginable alternative. What Justice Scalia recently noted in the context of commercial speech is also appropriate here:

> What our decisions require is a "fit between the legislature's ends and the means chosen to accomplish those ends,". . . a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served,". . . that employs not necessarily the least restrictive means but, as we have put in other contexts . . . a means narrowly tailored to achieve the desired objective. *Within those bounds we leave it to governmental decision makers to judge what manner of regulation may best be employed.*

Board of Trustees of State University of New York v. Fox, 492 U.S. ___, 57 U.S.L.W. 5015, 5018 (1989) (emphasis added).

650 (1971); *Ascertainment of Community Problems by Applicants*, 57 F.C.C.2d 418 (1976). The Commission included minority and ethnic groups as a significant segment of the community whose views were to be ascertained. 57 F.C.C.2d at 419, 447. Subsequently, however, the Commission found that,

> While the broadcasting industry has on the whole responded positively to its ascertainment obligations . . . we are compelled to observe that views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to the minority audience but to all of the viewing and listening public.

1978 Policy Statement, 68 F.C.C.2d at 980-981 (citations omitted). Only after the ascertainment policy proved inadequate did the Commission adopt the tax certificate, distress sale, and minority enhancement policies.

Another example of the Commission's use of race-neutral alternatives are the multiple ownership rules that limit the number of broadcast outlets that can be owned. *See* 47 C.F.R. § 73.3555 (1988). These rules are designed "to encourage diversity in the ownership of broadcast stations so as to foster viewpoint diversity." *Amendment of Section 73.3555*, 4 FCC Rcd 1741, 1743 (1989). While some of these rules were instituted well before the minority ownership policies, they nonetheless have resulted in no appreciable increase in the number of minority owners of radio or television licenses.[12]

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[12] Moreover, the FCC has considered and rejected the use of race-neutral alternatives that focus on reviewing the program content of all broadcasters to determine their sensitivity to minority views as raising serious first amendment problems. As discussed below, *see supra* section II(B), the use of structural methods, such as the minority enhancement policy, is an attempt by the FCC to avoid government intrusion into regulation of program content.

Relying on such past experiences, the FCC, and subsequently Congress,[13] concluded that resort to race-conscious means was necessary. *Cf. Fullilove*, 448 U.S. at 463-467; *see also id.* at 511 (Powell, J., concurring). Such a considered judgment is entitled to substantial deference by this Court, particularly in light of the careful methods by which the FCC policies are implemented.

B. The Minority Enhancement Policy Is Applied in a Flexible, Case-by-Case Manner

In *Croson*, this Court found that policies which apply a case-by-case approach "are less problematic from an equal protection standpoint because they treat all candidates individually, rather than making the color of an applicant's skin the sole relevant consideration." *Croson*, 109 S.Ct. at 728-29; *see also Fullilove*, 448 U.S. at 486-87. The FCC's comparative hearing process entails thorough case-by-case scrutiny of each application; no applicant is excluded from consideration because of race; and the enhancement credit "may be rebutted in the administrative process." *Fullilove*, 448 U.S. at 487.

The Commission weighs a variety of factors in determining which applicant should receive the award. *See 1965 Policy Statement*, 1 F.C.C.2d at 394-99. The Commission characterizes diversification of control of the media as of "primary significance."

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[13] When Congress passed legislation in 1982 authorizing the use of lotteries in lieu of comparative hearings, it specifically mandated that significant preferences for minority applicants be employed where a lottery is used. *See* Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087, 1094-95, codified at 47 U.S.C. 309(i)(3)(A) and (C)(ii). More recently Congress enacted into law, by way of the 1987 Continuing Resolution, the FCC's comparative minority preference policy. *See* Continuing Appropriations For Fiscal Year 1988, Pub.L. 100-202, 101 Stat. 1329 (1987). Analogous provisions have been enacted for subsequent fiscal years. *See* Departments of Commerce, Justice, & State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216 (1988); Departments of Commerce, Justice, & State, the Judiciary and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020 (1989).

Id. at 394. Thus, applicants owning no interests in existing media concerns are given a preference over applicants with such interests. *See Amendment of the Commission's Rules to Allow the Selection from Among Competing Applicants for New AM, FM and Television Stations By Random Selection (Lottery)*, 4 FCC Rcd 2246, 2258 (1989) (hereinafter *Lottery Rulemaking*).

The *1965 Policy Statement* identified the second factor, integration of ownership in the day-to-day management of the broadcasting station, as having "substantial importance." *1965 Policy Statement*, 1 F.C.C.2d at 395.[14] Comparative analysis under management integration involves a two-step approach. First, the Administrative Law Judge (ALJ) determines, on a *quantitative* basis, the extent to which the owners propose to work in management positions such as general manager, station manager, program director, or sales manager, at the station. If there is no significant quantitative difference, the ALJ will award enhancements for integrated owners who demonstrate *qualitative* superiority because they: (1) reside or propose to reside in the station's community of license; (2) are minority; (3) are female; (4) participate in civic activities; and (5) possess past broadcast experience. *Lottery Rulemaking*, 4 FCC Rcd at 2259.

Based on these criteria, the ALJ awards enhancements that range from "overwhelming" to "very slight." *Id.* The ALJ then compares the applicants to each other and selects an overall winner. Because of the myriad of factors involved and the fine gradations of weight accorded to each of these factors, a single criterion is rarely outcome determinative.

The minority enhancement becomes relevant *only* after the Commission determines that there are no significant differences in the competing applicants' management integration proposals. *See WHW Enterprises, Inc.*, 89 F.C.C.2d 799, 817 (Rev. Bd. 1982), *review denied*, FCC 83-368 (Sept. 15, 1983), *aff'd in part and rev'd in part on other grounds*, 753 F.2d 1132 (D.C. Cir.

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[14] Several other factors may also be taken into consideration. These include proposed program service, an applicant's past broadcast record, efficiency of frequency use, an applicant's character, and any other "relevant and substantial factors" specifically designated by the Commission. *See 1965 Policy Statement* at 394-99.

1985). Accordingly, an applicant with a clear advantage over another in its management integration proposal will always be preferred to a minority.

Even in cases where the minority enhancement policy applies, no applicants are excluded because of their race. Nor is an applicant automatically given a preference because of race. In order to receive any enhancement for minority ownership, the minority owner must work at the station in a position that significantly affects programming decisions or station management for a substantial number of hours per week.[15] For example, in *San Joaquin TV Improvement Corp.*, 96 F.C.C.2d 594, 599-600 (1983), *recon. denied*, 96 F.C.C.2d 617 (1984), no enhancement was awarded to a minority stockholder because his proposed position as general counsel for the station was found to have insufficient influence on program decisions.

Moreover, despite Metro's assertion to the contrary, the enhancement credit is not automatically determinative. *See* Brief of Petitioner at 22. Metro attempts to demonstrate that the enhancement is determinative as a practical matter by referring to seventy-eight recent FCC comparative licensing decisions. *Id.* at 23. Metro apparently reasoned that every time a minority applicant prevailed, it was because of the minority enhancement policy. Nothing could be further from the truth. A review of the decisions that Metro asserts were decided on the basis of the minority enhancement reveals that, in the overwhelming majority of them, factors other than the enhancement were determinative.[16]

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[15] No full-time management integration credit is given to an applicant who works less than 40 hours a week, and no part-time management integration credit is awarded to an applicant who works less than 20 hours per week. *See Midwest Broadcasting Company*, 70 F.C.C.2d 1489, 1495 (Rev. Bd. 1979).

[16] Of 78 recent comparative cases, Metro asserts that white males won 26; white females won 10; minorities and females won 42, *see* Brief of Petitioner at 23 n. 59. Our survey includes only the last category. Of these 42 cases in which Metro asserts that the minority enhancement was determinative, there were 33 in which the minority enhancement was clearly *not* determinative. Those 33 cases are: *Duane*

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Tomko, 2 FCC Rcd 206 (ALJ 1987) (determinative factor was 100% management integration credit); *Tulsa Broadcasting Group*, 2 FCC Rcd 1149 (ALJ 1987) (both finalists received minority enhancement, dispositive factor was that one applicant had prior broadcast experience while the other did not); *Magdalene Gunden Partnership*, 2 FCC Rcd 1223 (ALJ 1987) ("management integration preference [was the] . . . controlling factor in this case." *Id.* at 1238); *Dalton TV Associates Limited*, 2 FCC Rcd 2940 (ALJ 1987) (both applicants were minorities); *Armando Garcia*, 2 FCC Rcd 4166 (ALJ 1987) (sum total of Garcia's enhancements outweighed Reimer's enhancements); *Bogner Newton Corp.*, 2 FCC Rcd 4792 (ALJ 1987) ("The disparity between the [management] integration credit attributed to Mountain as opposed to NBC and any other applicants is such that no amount of enhancement could offset Mountain's integration superiority." *Id.* at 4805); *Washoe Shoshone Broadcasting*, 2 FCC Rcd 5362 (ALJ 1987) (several applicants received minority enhancement); *Hispanic Keys Broadcasting Corp.*, 2 FCC Rcd 6255 (ALJ 1987) (several applicants entitled to 100% minority enhancement; past residence and civic participation were decisive factors); *Religious Broadcasting Network*, 2 FCC Rcd 6561 (ALJ 1987) (winning applicant would have prevailed without the minority/female enhancement); *Northampton Media Associates*, 3 FCC Rcd 570 (ALJ 1988) (one applicant found to be a sham and thus received no integration credit; remaining applicant was entitled to a 65% integration credit and thus was awarded the license); *UN2JC Communications*, 3 FCC Rcd 2243 (ALJ 1988) (prevailing applicant won because of greater broadcast experience, better comparative coverage, and female status); *62 Broadcasting, Inc.*, 3 FCC Rcd 4429 (ALJ 1988) ("The dispositive factor was superiority under the comparative coverage criterion. 62 Broadcasting's provision of a first servi · (3,408 people) and a second service (810 people) warrants a clear and decisive comparative victory." *Id.* at 4450); *Marlin Broadcasting of Central Florida*, 3 FCC Rcd 4699 (ALJ 1988) (civic participation and past broadcast experience were the dispositive factors); *Key Broadcasting Corp.*, 3 FCC Rcd 6587 (ALJ 1988) (dispositive factor was that prevailing applicant had a 100% full-time management integration whereas next closest applicant had a 60% part-time and 40% full-time management integration credit); *DLBS Incorporated*, 3 FCC Rcd 6710 (ALJ 1988) (three finalists each entitled to 100% minority enhancement winner prevailed based on sum total of other enhancements); *Pontchartrain Broadcast Co.*, 3 FCC Rcd 6800 (ALJ 1988) (minority enhancement was not dispositive; prevailing applicant had overall superior integration proposal based on full-time commitment and local residence as well as minority status);

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The Baltimore Radio Show, 3 FCC Rcd 6823 (ALJ 1988) (as between final two applicants, "[b]oth receive[d] equal minority and female enhancement credit. . . . The critical difference was that" one applicant received civic participation enhancement credit and the other did not. *Id.* at 6828); *Ramon Rodriguez & Associates*, 4 FCC Rcd 370 (ALJ 1989) (each applicant received minority and female enhancement); *Beaux Bridge Broadcasters Limited Partnership*, 4 FCC Rcd 581 (ALJ 1989) (prevailing applicant was entitled to credit for proposing that its full controlling interest would also manage the station on a day-to-day basis; this was the determinative factor as the "applicants [were] equal in all other comparisons." *Id.* at 585.); *Corydon Broadcasters Limited*, 4 FCC Rcd 1537 (ALJ 1989) (winning applicant entitled to 100% integration credit while loser not entitled to any integration credit; both applicants had minorities); *Coastal Broadcasting Partners*, 4 FCC Rcd 2345 (ALJ 1989) (each of five finalists were entitled to 100% enhancement for racial minority status; this factor was thus not dispositive); *Renee Marie Kramer*, 4 FCC Rcd 2848 (ALJ 1989) (both finalists were entitled to racial preference, therefore, this factor was not dispositive); *Perry Television, Inc.*, 4 FCC Rcd 4603 (ALJ 1989) (prevailing applicant received no integration credit and thus its claim for minority enhancement was moot; winner had superior comparative coverage); *George Henry Clay*, 4 FCC Rcd 4654 (ALJ 1989) (prevailing applicant was qualitatively better than closest competitor because it proposed auxiliary power where the other had not and had no continuing relationship with other broadcast stations in the region while the other had.); *Weyburn Broadcasting Limited Partnership*, 4 FCC Rcd 5310 (ALJ 1989) (winner was not the only minority applicant and minority enhancement was not dispositive); *Poughkeepsie Broadcasting Limited Partnership*, 4 FCC Rcd 6543 (ALJ 1989) (winner awarded license because it was the only applicant entitled to a full-time integration credit.); *Rayne Broadcasting Co., Inc.*, 4 FCC Rcd 6552 (ALJ 1989) (both applicants had "equal gender-minority preferences." *Id.* at 6560); *Don H. Barden*, 4 FCC Rcd 7043 (ALJ 1989) (minority enhancement was not dispositive); *Pueblo Radio Broadcasting*, 4 FCC Rcd 7802 (ALJ 1989) (prevailing applicant was only one to receive 100% management integration credit; this was dispositive factor); *Richardson Broadcasting Group*, 4 FCC Rcd 7989 (ALJ 1989) (prevailing applicant was awarded a *substantial* and *decisional* preference over" the other finalist based on the environmental impact criterion. *Id.* at 7999 (emphasis in original); the winning applicant "would [have] prevailed even without [the] minority enhancement claim." *Id.*); *Rem Malloy Broadcasting*, 4 FCC Rcd 8423 (ALJ 1989) (several applicants were

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Nonminority applicants may, and often times do, prevail over minority applicants with minority enhancement credit. For example, in *Global Information Technologies, Inc.*, 4 FCC Rcd 5445 (ALJ 1989), the ALJ granted the license to a nonminority applicant with higher management integration credits than another applicant, whose principals were of Hispanic descent. *Id.* at 5455. Furthermore, a nonminority applicant can offset a competitor's minority enhancement credit, or claim such credit for itself, by demonstrating a special sensitivity to minority viewpoints in individual cases. In *San Joaquin TV Improvement Corp.*, a nonminority applicant argued that it possessed "special sensitivity to the minority audience." 96 F.C.C.2d 594, 601 n.15. The Review Board held that a nonminority applicant was entitled to submit evidence designed "to show that any meritorious consideration of . . . [the other applicant's] minority ownership should be offset, at least, by countervailing factors." *Id.* at 601.[17] The FCC policy thus provides for precisely the type of flexible, individualized, case-by-case approach which this Court has ruled appropriate in evaluating race-conscious measures.

C. The Minority Enhancement Policy is Limited in its Duration and Places No Improper Burden on Third Parties

"equal under the minority enhancement factor and no minority preference [was] warranted." The prevailing applicant "was superior to the other applicants under the local residence factor." *Id.* at 8429. Winner was also superior in civic participation and prior broadcast experience criteria.); *WCVQ, Inc.*, 4 FCC Rcd 8554 (ALJ 1989) (several applicants received 100% minority enhancement credit); *Silver Springs Communications*, FCC 90D-4 (ALJ released Jan. 24, 1990) (prevailing applicant was only one to receive 100% management integration credit). Even in the nine remaining cases, the minority enhancement was not necessarily dispositive but played some role in the outcome.

17 *See also Chase Communications Co.*, 100 F.C.C.2d 689, 692-93 (Rev. Bd. 1985); *International Radio, Inc.*, 56 R.R. 2d 903, 931 n.120 (Rev. Bd. 1984), *review denied*, FCC 85-108 (released March 13, 1985).

In *Croson*, four members of this Court criticized theories that "could be used to 'justify' race-based decision making essentially limitless in scope and duration." *Croson*, 109 S.Ct. at 723. They rejected measures "that are ageless in their reach into the past, and timeless in their ability to affect the future." *Id.* (*quoting Wygant*, 476 U.S. at 276).

Both Congress and the FCC have indicated their intention to review periodically the need for the minority enhancement policy. The appropriations bills that foreclosed FCC reconsideration of this policy extended only for one year. Thus, the policy is subject to annual Congressional review. Moreover, when Congress decides to remove the limitation on the FCC's expenditure of funds, the FCC will be statutorily bound to determine whether the policy should be discontinued because the factual basis for it has disappeared. *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979).[18]

In addition, consideration must be given to the effect of the FCC's policies on third parties. In *Wygant*, a plurality of this Court established a crucial difference between policies that burden society in general and those that burden individuals specifically. As Justice Powell noted:

> In cases involving valid hiring goals the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose.

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18 There are cases in which the FCC has altered its rules in response to changed circumstances. *See, e.g., Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, No. 89-312 (Jan. 8, 1990) (FCC repealed the Fairness Doctrine because it found that the underlying premise, that the fairness doctrine did not chill speech, was no longer valid); *United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989) (FCC reinstated syndicated exclusivity regulations that it had previously eliminated in light of emergence of cable television as full competitor to broadcast television). In affirming the FCC's adoption or modification of policies, it is not uncommon for the court to rely on the FCC's ability to revisit its policies. *See, e.g., Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1438 (D.C. Cir. 1983) (repeal of commercial guidelines).

> Denial of a future employment opportunity is *not* as intrusive as a loss of an existing job.

Wygant, 476 U.S. at 282 (emphasis added).

Since race is only "one factor in a competitive multi-factor selection system," *West Michigan*, 735 F.2d at 613, nonminorities are not excluded from competing for any licenses. No licenses are reserved or set aside for particular groups. Unlike a layoff provision that takes away a job, the preference policy does not take away an existing license. The policy is more analogous to the hiring goals which impose the least amount of intrusion. The impact on nonminorities is thus diffused among society in general, unlike the harsh layoff provisions in *Wygant*. *See supra* at n.10. Moreover, any nonminority applicant can secure the benefit of the minority enhancement by sharing ownership and control of the station with a minority group member. The *Wygant* plurality's analysis simply does not apply to the FCC's minority preference policy. Particularly in light of the individualized and flexible manner by which the policy is applied, the minimal impact on nonminorities does not warrant invalidation of the policy.

III. THIS COURT SHOULD ACCORD SUBSTANTIAL DEFERENCE TO THE FCC POLICY IN THIS CASE AND SHOULD NOT STRICTLY SCRUTINIZE THE POLICY

As demonstrated above, because it is narrowly tialored to achieve a compelling governmental interest, the FCC minority enhancement policy would pass even strict scrutiny by this Court. In fact, however, the application of strict scrutiny to this policy is wrong as a matter of principle.

A. The Text of the Fourteenth Amendment, as Well as Its Legislative History and the Intent of Its Framers, Is Flatly Inconsistent with Subjecting Congressionally Mandated Affirmative Action Measures to Strict Scrutiny

In *Croson*, this Court held that the City of Richmond's minority set-aside program was unconstitutional because it failed to satisfy the strict scrutiny required for statutes incorporating racial classifications that are enacted by states or their political subdivisions. In the course of so holding, however, Justice O'Connor's plurality opinion emphasized that a very different analysis would apply to federally mandated affirmative action measures:

> Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.

Croson, 109 S.Ct. at 719 (emphasis in original).

Both the text and the legislative history of the fourteenth amendment support this dramatically different treatment of federal and state authority to adopt affirmative action measures. By its terms, the equal protection clause of the fourteenth amendment has no application to the federal government. The failure to include Congress within its ambit was hardly an oversight: The Reconstruction Congress distrusted the states and wished to curb state power regarding the treatment of the newly freed slaves. It did not distrust itself. On the contrary, as Justice O'Connor has pointed out, the primary purpose of the fourteenth amendment was to *enlarge* congressional power so as to ensure Congress' authority to adopt affirmative action measures that would protect the rights of the freedmen.

In the immediate aftermath of the Civil War, it became apparent to members of Congress that the thirteenth amendment

alone was inadequate to protect the rights of blacks. Black Codes, adopted in a number of southern states, had reestablished the substance of slavery by seriously interfering with the right of blacks to contract, to own property, and to secure access to the courts.[19] Moreover, in the view of the Radical Republicans then controlling Congress, pervasive private violence in the South was preventing the full integration of blacks into civil society — the cause for which the Civil War had been fought.[20]

Congress responded to these problems by enacting the Civil Rights Act of 1866, which, *inter alia*, granted to all citizens the same right to make and enforce contracts, sue, give evidence, acquire property and "full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens."[21] In addition, Congress attempted to expand significantly the authority of the Freedmen's Bureau, which was

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[19] *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 95 (1865-66) (statement of Sen. Sumner); *id.* at 340 (statement of Sen. Wilson); *id.* at 91 (statement of Sen. Sumner); *id.* at 39 (statement of Sen. Wilson); *id.* at 41 (statement of Sen. Wilson). *See also* R. Harris, THE QUEST FOR EQUALITY 25 (1960); J. tenBrock, EQUAL UNDER LAW 180 (1965).

[20] *See* H.R. Rep. No. 30, 39th Cong., 1st Sess., Serial 1273 (1866) (*cited in* J. tenBrock, EQUAL UNDER LAW 204 (1965)). For examples of violence noted by members of Congress *see, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 95, 168, 339, 340, 503 (1865-66); for a compilation of the testimony presented to the Joint Committee on Reconstruction *see* L. Warsoff, EQUALITY AND THE LAW 109-10 (1938); *see also* Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 Yale L.J. 1353, 1354 n. 12 (1963-64).

[21] An Act to Protect All Persons in the United States in their Civil Rights, and Furnish Means of their Vindication, 14 Stat. 27 (1886). *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 438 (1865-66) (statement of Sen. Howe); Cong. Globe, 39th Cong., 1st Sess. 321-23 (1865-66) (statement of Sen. Trumbull); *see also* R. Harris, THE QUEST FOR EQUALITY 25 (1960); H. Flack, THE ADOPTION OF THE FOURTEENTH AMENDMENT, 11-54 (1908).

designed to provide special aid for blacks in their struggle to overcome the heritage of slavery and become full citizens.[22]

It is important to understand that these laws were the nineteenth century analogue of modern affirmative action measures. They were intended to deal with the unique problems of racial minorities and to provide them with special protections.[23] As an opponent of the Freedmen's Bureau legislation argued to his colleagues, "This present bill is to secure the protection of the Government to the blacks exclusively, notwithstanding the apparent liberality of the measure to all colors and classes . . . . [It] will plainly be seen that black freedmen and not white refugees were the special care of the bureau." Cong. Globe, 39th Cong, 1st sess., Appendix at 78-79 (statement of Rep. Chanler).

The Congress that enacted these measures was distrustful not only of the states, but also of the federal judiciary. Indeed, the immediate impetus for the fourteenth amendment was the desire to curb the power of the courts so as to shield the newly enacted legislation from judicial attack. One commentator describes the backdrop against which the fourteenth amendment was enacted as follows:

> Former Abolitionists had not forgiven the Supreme Court for its decision in the *Dred Scott* case or for Chief

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22 *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 77 (1865-66) (statement of Sen. Trumbull); *id.* at 1088 (statement of Rep. Woodbridge); Curtis, *The Fourteenth Amendment and the Bill of Rights*, 14 Conn. L. Rev. 237 (1982); *National Anti-Slavery Standard*, June 3, 1865 (*cited in* E. Foner, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 258-59 (1988)). "The Freedmen's Bureau had already taken steps to protect these rights [The Bill of Rights], and the amendment was deemed necessary, in part, precisely because every one of them was being systematically violated in the South in 1866." E. Foner, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 258-59 (1988).

23 *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 43 (1865-66) (statement of Sen. Trumbull); *id* at 74 (statement of Rep. Stevens); *id* at 438 (statement of Sen. Howe); *id* at 77 (statement of Sen. Trumbull); *id* at 90-91 (statement of Sen Sumner); *see also* Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 Yale L.J. 1353, 1363-67 (1963-64).

> Justice Roger B. Taney's circuit court opinion in *Ex parte Merryman* . . . . The hostility of Radicals to the Court was intensified by Chief Justice Salmon P. Chase's refusal to hold circuit court in states under martial law, thereby preventing the trial of Jefferson Davis, and the fears that their reconstruction policies would be invalidated.
>
> After the submission of the proposed amendment, congressional Radicals and their journalistic allies were successively infuriated by the decision in *Ex Parte Milligan* ... which rescued a "Copperhead" from a well-deserved hanging, by the Court's temerity in merely hearing without deciding a case challenging the validity of the Reconstruction Act, . . . [and] the Court's invalidation of the test oath in *Garland*.

R. Harris, THE QUEST FOR EQUALITY 54 (1977) (footnotes omitted).

As originally proposed by Congressman Bingham, the fourteenth amendment consisted solely of what is now section five, granting authority to Congress to enforce equality through appropriate legislation. *See* Cong. Globe, 39th Cong., 1st Sess. 1033-34 (1865-66) (statement of Rep. Bingham). Speaker after speaker defended the amendment as necessary to ensure the constitutionality of the recently enacted reconstruction legislation. Although the self-executing provisions of the amendment were later added, the amendment's supporters made clear that their primary intent was to safeguard congressional power from judicial overreaching.[24]

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24 "I regard as very doubtful, to say the least," said Henry J. Raymond, conservative Republican from N.Y., "whether Congress, under the existing Constitution, had any power" to enact The Civil Rights Bill. "Now, it is again proposed so to amend the Constitution as to confer upon Congress the power to pass it." Cong. Globe, 39th Cong., 1st Sess. 2502 (1865-66). *See also* statements of Stevens at 2459; Boyer at 2467; Kelley at 2468; Bromall at 2498; Spalding at 2509; Eliot at 2511; Eckley at 2534; Farnsworth at 2539; Poland at 2961. *See also* R. Harris, THE QUEST FOR EQUALITY 35 (1977); J.

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In light of this history, judicial strict scrutiny and invalidation of the federal government's minority enhancement policy would turn the fourteenth amendment on its head. It would convert a grant of authority to Congress to enact affirmative action measures into a grant of authority to the judiciary to strike them down.[25]

This Court has recently decried the use of judicial power to invalidate measures enacted by the politically responsive branches of government in circumstances where there is no textual support for judicial intervention. *See, e.g., Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution"). *See also Thornburgh v. American Coll. of Obst. & Gyn.*, 476 U.S. 747, 787 (1986) (White, J., dissenting) ("[D]ecisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation.")

As demonstrated above, there is *no* support in either the text or legislative history of the fourteenth amendment for the

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tenBroek, EQUAL UNDER LAW 224 (1965); Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 Wash. Univ. L.Q. 421, 441 n. 56; J. James, THE FRAMING OF THE FOURTEENTH AMENDMENT 184 (1956); Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 Yale L.J. 1353, 1356 (1963-64).

[25] The Supreme Court has traditionally "'accorded great weight to the decisions of Congress'" when Congress acts under its power to enforce the equal protection clause. *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1973). Congressional insistence on maintaining the minority preference policy has been unambiguous and forceful. In 1987, the FCC suggested that it was considering abandoning the policy. Congress expressly found that "promoting minority ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming," S. Rep. No. 100-182, 100th Cong., 1st Sess. 76 (1987), and prohibited the reconsideration. *See* Pub. L. No. 100-202, 101 Stat. 1329 (1987). *See also* Pub. L. No. 100-459, 102 Stat. 2216 (1988); Pub. L. No. 101-162, 103 Stat. 1020 (1989).

proposition that Congress lacks the authority to enact affirmative action measures. This Court's refusal in cases such as *Bowers v. Hardwick*, 478 U.S. 186 (1986), to overturn political judgments in the absence of textual authority is therefore fully applicable here. Indeed, this is a far stronger case than *Bowers* for judicial abstention. Although the *Bowers* majority found nothing in the constitutional text that justified judicial intervention, neither was there anything in the text that precluded it. In contrast, petitioners ask this Court to invalidate the federal government's minority enhancement policy not only in the absence of textual authority for judicial intervention, but *in the face of a constitutional provision enacted specifically so as to prohibit such intervention.* If this Court were to follow that course, it would effectively render the considered decision of the Reconstruction Congress a nullity.

B. This Court's Decision in *Bolling v. Sharpe*, Subjecting Legislation Discriminating against a Racial Minority to Strict Scrutiny under The Fifth Amendment, Is Inapplicable to Affirmative Action Measures

In *Bolling v. Sharpe*, 347 U.S. 497 (1954), this Court held that even though the equal protection clause of the fourteenth amendment was inapplicable to the federal government, discrimination against racial minorities might be "so unjustifiable" as to violate the due process clause of the fifth

Bolling suggests that the Court intended to cut back on Congress' power under section five of the fourteenth amendment to enforce the equality rights of racial minorities. Moreover, although *Bolling* has been held applicable to discrimination against other minority groups,[26] this Court has never held that the *Bolling* principle mandates strict scrutiny for federal affirmative action measures. *Cf. Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980) (strict scrutiny inapplicable to federal affirmative action programs). For reasons outlined above, such a holding would contravene the fourteenth amendment, which was specifically designed to authorize such measures. Moreover,

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[26] *See, e.g., Graham v. Richardson*, 403 U.S. 365 (1970) (aliens); *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (illegitimate children).

such a holding would be flatly inconsistent with Justice O'Connor's plurality opinion in *Croson*.

In *Croson*, Justice O'Connor expressly stated that pursuant to its authority under section five of the fourteenth amendment, Congress could constitutionally enact affirmative action measures that would be unconstitutional if enacted by the states or their subdivisions. *Croson*, 109 S.Ct. at 719-20. In the course of so holding, she relied upon *Katzenbach v. Morgan*, 384 U.S. 641 (1966), wherein the Court recognized Congress' independent authority to adopt reasonable measures designed to enforce the fourteenth amendment. *Croson*, 109 S.Ct. at 719.

In *Morgan*, the Court made clear that although section five of the fourteenth amendment granted Congress the authority to enforce equality principles, it did not "grant Congress power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.'" *Morgan*, 384 U.S. at 651 n.10. Superficially, it might appear that the *Croson* plurality opinion is inconsistent with *Morgan's* "one way ratchet." The holding of *Croson* was that the plaintiff's individual equality right had been violated by Richmond's affirmative action plan. If there were also such a right vis-a-vis the federal government, permitting Congress to enact a similar plan would "dilute equal protection . . . decisions of this Court."

Croson can be reconciled with *Morgan* only by recognizing that the right vindicated by the *Croson* Court was a right enjoyed against the states and their subdivisions and not a right enjoyed against the federal government. For this reason, recognition of congressional power to enact the very same affirmative action measure that is beyond the power of the states involves no dilution of equality rights. Thus, Justice O'Connor's opinion in *Croson* implicitly read *Bolling* as inapplicable to affirmative action measures designed to benefit racial minorities. Because *Bolling* leaves Congressional authority to enforce the fourteenth amendment for the benefit of racial minorities untouched, this Court should not strictly scrutinize a measure enacted pursuant to that authority.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Angela J. Campbell
(Counsel of record)
Louis M. Seidman
Jean D. Larosiliere
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Suite 312
Washington, D.C. 20001
(202) 662-9535*

Of Counsel:

Andrew Jay Schwartzman
Gigi B. Sohn
Media Access Project
2000 M Street, N.W.
Washington, D.C. 2003

Elliot M. Mincberg
People for the American Way
2000 M Street, N.W.
Washington, D.C. 20036

Anthony L. Pharr
Office of Communication of
The United Church of Christ
2000 M Street, N.W.
Washington, D.C. 20036

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* Eric S. Roth and Kathryn K. Heet, students at Georgetown University Law Center, and Bruce F. Rubin, a student at UCLA Law School provided valuable assistance in the preparation of this brief.